Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS,
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

PRELIMINARY STATEMENT

On November 10, 1987 Honorable Solomon Casseb, Jr. ("Judge Casseb") called the disciplinary actions against Musslewhite to trial. The underlying disciplinary actions accused Musslewhite of three serious client neglects, attempting to pay off a complaining witness, communicating with a party represented by counsel, solicitation through the use of runners, and improper selling off of fee interests. Petitioners in those actions, the Grievance Committees for the State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee chairman, and Musslewhite appeared in person and by counsel. Counsel for

Petitioners announced ready for trial and counsel for Musslewhite announced not ready for trial. After Judge Casseb overruled Musslewhite's motion for continuance along with various other dilatory motions, Musslewhite sought to enter into settlement negotiations. Judge Casseb permitted the parties to discuss prospective settlement and the parties thereafter announced to Judge Casseb in open court a settlement of the disciplinary actions.

On January 29, 1988, Judge Casseb signed a Judgment in conformity with the agreement of the parties. The Judgment provides in pertinent part:

> IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days beginning on November 1, 1988, and ending on January 30, 1989.
>
> IT IS FURTHER ORDERED that the

Court may upon written request of Respondent showing good cause and with recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.

IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988, and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, §7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton to a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

On July 19, 1988, the court-appointed custodian over

Musslewhite's law practice, Hartley Hampton, and the State Bar of Texas, by and through its Office of General Counsel, filed a Motion to Conduct Oral Hearing with respect to Musslewhite's activities concerning the Piper Alpha tragedy in Scotland and concerning the filing of the Hartman lawsuit. Judge Casseb thereafter set such motion for hearing for September 18, 1988. Judge Casseb also ordered that the movants be permitted to engage in discovery. After discovery, the State Bar of Texas filed its Motion to Revoke Probation on September 12, 1988. Such motion raised the same issues as in the prior motion.

On September 20, 1988, Judge Casseb commenced receiving evidence on the Motion to Conduct Oral Hearing and then on the Motion to Revoke Probation. At

the conclusion of proceedings on that day, Judge Casseb continued the matter over to October 17, 1988. On October 17 and 18, 1988, Judge Casseb received all the evidence Musslewhite or his counsel had to offer concerning the Motion to Revoke Probation.

By letter dated October 19, 1988, Judge Casseb granted the Motion to Revoke Probation, permitted Musslewhite to participate in a certain trial, and suspended Musselwhite from the practice of law for three (3) years, beginning December 1, 1988. On November 7, 1988, Judge Casseb heard Musslewhite's motions to conduct hearing on punishment, to reconsider, for rehearing and reconsideration, and to delay imposition of suspension. Judge Casseb overruled Musslewhite's motions, and suspended

Musslewhite from the practice of law for three (3) years, beginning January 31, 1989, so that Musslewhite could participate in a certain trial.

On November 21, 1988, Judge Casseb signed an Order Revoking Probation and Imposing suspension for three (3) years, commencing January 31, 1989. Judge Casseb signed Findings of Fact and Conclusions of Law on December 27, 1988, and December 29, 1988.

Musslewhite is currently appealing the revocation order in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, Houston, Texas. Many of Musslewhite's arguments (See Petitioner's Brief pp. 52-64) are the same ones being made in the lower state court and cannot be considered by this Court. In addition, Musslewhite

argues the issue of selective prosecution by the State Bar of Texas and attempts to inject exhibits which are not a part of any court's record. Although Musslewhite attempted to supplement the record with these exhibits and to file a supplemental brief with respect to selective prosecution with the Court of Appeals, his motion was denied by the state court of appeals on October 5, 1989. Thus, the issue may not be considered by this Court. Exhibits I (1-32) through P; S through X; and AA (1-3), BB (1-2), CC, DD, EE should be disregarded in their entirety.

ARGUMENT AND AUTHORITIES

Musslewhite argues that the trial court should have granted his request for supersedeas pursuant to Rule 47,

Tex.R.App.P. 47 provides in part:

> Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk . . . . (Emphasis added).

Art. X, Sec. 24, State Bar Rules, provides as follows:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, be or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Emphasis added).

Musslewhite argues that either (a) Section 24 should be read in conjunction with Sections 22 and 26 of the State Bar Rules or (b) Section 24 is unconstitutional.

His first argument is based on some theory that the meaning of Section 24 is

not clear. Section 24 is clear, unambiguous, compulsory, and constitutional. The rule simply provides that lawyers, such as Musslewhite may not practice law pending appeal of their suspension or disbarment. This statute specifically addresses the status of a lawyer who has been suspended from the practice of law during pendency of the appeal. No discretion to override this statute is granted to any court. Thus Judge Casseb was correct in denying Musslewhite's motion. Judge Casseb not only had no duty to permit Musslewhite under any terms to secure a stay of his suspension, Section 24 clearly establishes that Musslewhite has no right to practice pending appeal. Judge Casseb did not even have any discretion

to abuse.

Musslewhite contends that to establish the meaning of Section 24, it must be read along with Art. X Section 22 of the State Bar Rules. Section 22 by its very terms has nothing to do with an attorney subject to a trial court's final order of suspension or disbarment. Section 22 permits an immediate interim suspension, similar to a temporary injunction "pending the final disposition of a disciplinary action . . . ." (See App. 3 for Text) A Section 22 interim suspension protects the public during the course of a grievance matter against a lawyer found to be an immediate threat to the public, whereas Section 24 protects the public from a lawyer suspended or disbarred after trial. Art. X §26 of the State

Bar Rules provides for compulsory discipline of a lawyer who has been convicted of a serious crime.

The rules cannot mandate Section 24 be construed in pari materia with Sections 22 and 26. Lawyers are suspended and disbarred for reasons other than conviction of crimes or threats to the public. In fact, most lawyers are suspended and disbarred for reasons other than having been convicted or because they are threats to society. Thus, Section 24 specifically contemplates those lawyers who are suspended and disbarred for reasons other than constituting irreparable harm and/or being a convicted felon.

In addition, Section 22 provides a mechanism for suspension throughout the process when the lawyer is shown to be

an imminent threat to the public. Likewise, Section 26 provides its own mechanism for dealing with lawyers who are appealing their criminal convictions and mandates that they be suspended while doing so.

Thus, Section 24 not only covers the above-mentioned situations but also all other situations in which lawyers have been suspended and disbarred. There is absolutely no implied conflict between these sections.

Musslewhite argues that if one does not read the sections together then Section 24 must be unconstitutional. In support of this position, he states that disciplinary actions are penal in nature. But the Texas case of Bryant v. State, 457 S.W.2d 72 (Tex.Civ.App. Eastland 1970, writ ref'd n.r.e.),

states otherwise. The court in Bryant held:

> A license to practice law is not such a property right as is immune to such regulation. . . . Such proceedings are not penal in nature. They are not taken for the purpose of punishing the attorney. They are civil.

The cases cited by Musslewhite to characterize the right concern affording a lawyer procedural due process prior to revoking or suspending of his license. They have no applicability to a lawyer subject to a trial court's final order of suspension or disbarment. Musslewhite was clearly afforded due process during the revocation proceeding.

More importantly, when dealing with attorney discipline, the primary concern is protection of the public. Lack of public confidence in the integrity of the bar overrides any policy that would

permit an attorney who has been duly found by a trial court of competent jurisdiction to have committed professional misconduct to continue to practice law pending appeal of their suspension or disbarment.

To do so would have adverse effects upon the profession. The same concerns which apply to a lawyer who has been convicted of a crime can be applied here. Clients unaware of the disbarment of suspension may retain the attorney and unwittingly compromise their rights. Adversary counsel aware of the sanctions may be reluctant to negotiate with the attorney, to enter into a settlement with him, to entrust him with an escrow fund or to be associated with him of counsel. When the judgment is affirmed, the client may be forced to

employ new counsel who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client. U.S. v. Friedland, 502 F. Supp. 611 (D.C.N.J. 1980). But most important, a lawyer who predicts defeat in his appeal has little to lose and may engage in additional serious misconduct toward any remaining clients for his own personal gain. The State Bar might add that it is as confident of its prevailing on the merits as is Musslewhite. The incentive for a lawyer to continue to violate ethical standards when facing defeat on appeal is great. Thus, to allow a lawyer to continue to practice after suspension or disbarment jeopardizes the rights of innocent clients and the justification for Section 24 is

abundantly clear. In Musslewhite's own case, the probated suspension began on January 31, 1989, and yet less that eight (8) months later Musslewhite had already violated the provisions of probation.

Thus, Musslewhite has no constitutional right supersede the suspension order pending exhaustion of appeal. The no supersedeas rule is analogous to a lawyer being suspended by operation of law pending appeal of a criminal conviction for a serious crime. In both instances, the lawyer may eventually secure appellate reversal and therefore practice law again, but the confidence of the public and the bar compels that lawyers convicted of serious crimes, and lawyers suspended or disbarred after trial of a disciplinary

action, must be suspended pending appeal.

> The practice of law is a license, not a right, and only persons of good moral character and fitness are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands.

State Bar of Texas v. Heard, 603 S.W.2d 829, 834 (Tex. 1980). Musslewhite is in no better position. In fact, should Musslewhite be permitted to practice pending appeal, and should appeal eventually favor the State Bar, at the Texas Court of Appeals, the Supreme Court of Texas, and/or the United States Supreme Court, Musslewhite may effectively avoid most of his suspension.

Musslewhite's attempt to analogize his situation with that of Texaco/Pennzoil is misplaced. The

Second Circuit case dealt with the essential elements necessary in bringing a 1983 action. In addition, the issue in Texaco was that of a denial of a fair opportunity to obtain an adjudication on the merits of an appeal. In Texaco, the posting of the bond would have destroyed the entity itself. Here Musslewhite retains every opportunity to appeal his case and every opportunity to continue to earn a living - albeit not in the field of law. If the judgment to revoke is reversed, the sole harm to Musslewhite is the deprivation of his privilege to practice law or its monetary equivalent. His complaint is nothing more than that of loss of economic earning power.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Application for Certiorari is denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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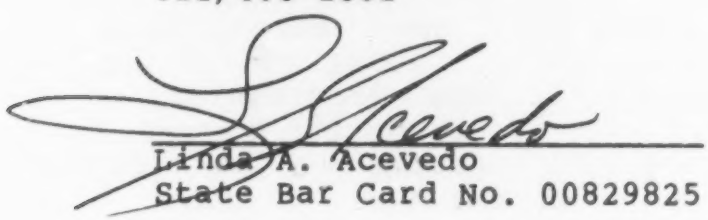

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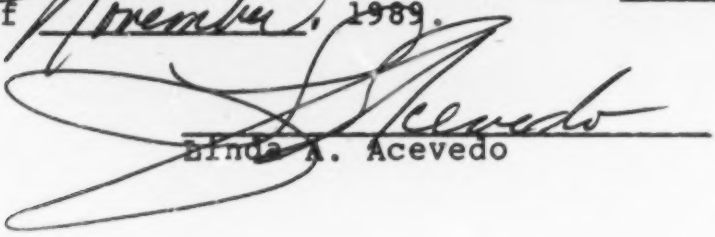
CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Benton Musslewhite, pro se, 1535 Mellie Esperson Bldg., 815 Walker, Houston, Texas 77002, by delivery of a true and correct copy to him by certified mail, return receipt requested, by depostiting same, enclosed in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 3rd day of November, 1989.



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